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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

6 * * *

7 TERRELL DESHON KEMP, SR.,

8 Plaintiff,

9 v.

10 SHERIFF JOE LOMBARDO, et al.,

11 Defendants.
12

Case No. 2:17-cv-01474-RFB-CWH

**SCREENING ORDER AND
REPORT AND RECOMMENDATION**

13 Nevada state-prison inmate Terrell Deshon Kemp brings this civil-rights case under 42
14 U.S.C. § 1983 for events that occurred after police officers responded to a call that Kemp had
15 been shot. Kemp moves to amend his complaint. (Mot. for Leave to Am. Compl. (ECF No. 13).)
16 Given that the court previously screened Kemp's complaint and gave him leave to file an
17 amended complaint, the court will grant the motion and instruct the clerk of court to detach and
18 file Kemp's amended complaint (ECF No. 13-1). The court now screens Kemp's amended
19 complaint as required by 28 U.S.C. §§ 1915(e)(2) and 1915A(a).

20 **I. ANALYSIS**

21 **A. Screening standard for pro se prisoner claims**

22 Federal courts must conduct a preliminary screening in any case in which a prisoner seeks
23 redress from a governmental entity or officer or employee of a governmental entity. *See* 28
24 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any
25 claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek
26 monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),
27 (2). In addition to the screening requirements under § 1915A, the Prison Litigation Reform Act
28 requires a federal court to dismiss a prisoner's claim if it "fails to state a claim on which relief

1 may be granted.” 28 U.S.C. § 1915(e)(2); *accord* Fed. R. Civ. Proc. 12(b)(6). To state a claim
2 under 42 U.S.C. § 1983, a plaintiff must allege “(1) the defendants acting under color of state law
3 (2) deprived plaintiffs of rights secured by the Constitution or federal statutes.” *Williams v.*
4 *California*, 764 F.3d 1002, 1009 (9th Cir. 2014) (quotation omitted).

5 Dismissal for failure to state a claim under § 1915(e)(2) incorporates the standard for
6 failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*, 668
7 F.3d 1108, 1112 (9th Cir. 2012). To survive § 1915 review, a complaint must “contain sufficient
8 factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *See*
9 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court liberally construes pro se complaints and
10 may only dismiss them “if it appears beyond doubt that the plaintiff can prove no set of facts in
11 support of his claim which would entitle him to relief.” *Nordstrom v. Ryan*, 762 F.3d 903, 908
12 (9th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678).

13 In considering whether the complaint states a claim, all allegations of material fact are
14 taken as true and construed in the light most favorable to the plaintiff. *Wylar Summit P’ship v.*
15 *Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). Although the
16 standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide
17 more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
18 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.* Unless it is
19 clear the complaint’s deficiencies could not be cured through amendment, a pro se plaintiff
20 should be given leave to amend the complaint with notice regarding the complaint’s deficiencies.
21 *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

22 **B. Screening the amended complaint**

23 Across four claims, Kemp sues the Las Vegas Metropolitan Police Department
24 (“LVMPD”) and its internal affairs department’s supervisors; Sheriff Joe Lombardo in his
25 personal and official capacities; Officer Cordova, Officer Cordero, and Sergeant T. Garcia in their
26 personal capacities; and three John Doe officers in their personal capacities for alleged violations
27 of the Fourth, Eighth, and Fourteenth Amendments. He seeks in excess of \$350,000 in monetary
28 damages and \$10,000 per officer in punitive damages.

1 1. *Excessive force (claim three)*

2 Kemp alleges that on May 26, 2015, he was shot in the head and arm. (Am. Compl. (ECF
3 No. 13-1) at 8.) He does not state who shot him. (*Id.*) A Good Samaritan called 911 for police
4 and an ambulance, let Kemp wait on the porch, and gave him a towel and a glass of water. (*Id.*)
5 Kemp alleges the ambulance and Officers Cordova and Cordero responded to emergency call.
6 (*Id.*) While Kemp simultaneously was receiving medical assistance on a gurney and looking at
7 his cell phone to find his parents' phone numbers, Officers Cordova and Cordero allegedly stated
8 Kemp "was uncooperative with who shot [him]" and said, "fuck him." (*Id.*) According to Kemp,
9 Officer Cordero then tried to bend Kemp's arm and snatch the cell phone from his hand. (*Id.*)
10 When Kemp tried to pull his arm away, the officers tackled him, snatched him off the gurney, and
11 slammed his head into the ground. (*Id.* at 8-9.) Kemp alleges Officers Cordova and Cordero, as
12 well as three John Doe officers, kicked him, kneed him in the back, and hit him on the face and
13 back of the neck. (*Id.* at 9.) Kemp also states he was handcuffed so tightly it made his wrists
14 bleed and his legs were handcuffed to his wrists in a hog-tie fashion, causing his legs to bend
15 backwards and "intense pain to shoot all through [his] body." (*Id.*) Finally, Kemp states an
16 officer put him in a choke hold, causing him to lose consciousness. (*Id.*)

17 As a result of this incident, Kemp alleges he suffered injuries to both of his legs and needs
18 surgery for his right knee, right shoulder, neck and back. (*Id.* at 10.) He further states the officers
19 caused a one-half-inch laceration in his head, chipped his tooth, and left a permanent, visible
20 bump on the right side of his face. (*Id.* at 8-10.) He also states his left pinky finger was
21 dislocated, resulting in loss of its full function. (*Id.* at 10.) These allegations are best construed
22 as a claim for excessive force under the Fourth Amendment, though Kemp also alleges this
23 conduct constituted cruel and unusual punishment under the Eighth Amendment and violated the
24 Fourteenth Amendment's due process clause.

25 i. Fourth Amendment

26 A claim of excessive force during an arrest is analyzed under the Fourth Amendment's
27 "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 395-97 (1989). Whether
28 the use of force by a law enforcement officer was objectively reasonable must be assessed "in

1 light of the facts and circumstances confronting [the officer], without regard to their underlying
2 intent or motivation.” *Id.* at 397. “Determining whether the force used to effect a particular
3 seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and
4 quality of the intrusion of the individual’s Fourth Amendment interests against the countervailing
5 governmental interests at stake.” *Id.* at 396 (quotations omitted). In this analysis, the court must
6 consider the following factors: (1) the severity of the crime at issue; (2) whether the plaintiff
7 posed an immediate threat to the safety of the officers or others; and (3) whether the plaintiff
8 actively resisted arrest. *Id.*; *see also Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912,
9 921 (9th Cir. 2001). While the *Graham* factors are guidelines, “there are no per se rules in the
10 Fourth Amendment excessive force context” and the court may examine the totality of the
11 circumstances. *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir.2011) (en banc).

12 Here, Kemp states a colorable excessive force claim against Officer Cordova, Officer
13 Cordero, and the three John Doe officers. He alleges that officers attacked him without
14 provocation, slamming his head into the ground, hog tying him, beating him, and putting him in a
15 choke hold, causing him to lose consciousness and resulting in a head laceration and other various
16 other injuries. Liberally construing Kemp’s amended complaint, he had not committed a crime
17 and did not pose a safety threat to the officers or anyone else. At the time of the encounter with
18 police, he was on a gurney because he already had been shot in the head and leg by an
19 unspecified person. The court therefore will recommend that Kemp’s excessive force claim
20 should proceed against Officer Cordova, Officer Cordero, and the three John Doe officers.

21 ii. Eighth and Fourteenth Amendments

22 The Eighth Amendment to the United States Constitution prohibits “cruel and unusual”
23 punishment. U.S. Const. amend. VIII. This prohibition applies to those who have been convicted
24 of a crime. *Graham*, 490 U.S. at 393 & n.6 (stating that the “Eighth Amendment standard applies
25 only after the State has complied with the constitutional guarantees traditionally associated with
26 criminal prosecutions.” (quotation omitted)). The Fourteenth Amendment’s due process clause
27 requires that before the government deprives a person of life, liberty, or property, it must give the
28 person notice and an opportunity to be heard. *See Clement v. City of Glendale*, 518 F.3d 1090,

1 1093 (9th Cir. 2008). Inmates who are injured by while in custody, but who have not yet been
2 convicted, may sue under the Fourteenth Amendment's due process clause, as a pretrial detainee
3 may not be punished before conviction. *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1068 (9th
4 Cir. 2016); *see also Avery v. Las Vegas Metro Police Dep't*, No. 2:16-cv-01774-GMN-GWF,
5 2018 WL 3972143, at *3 (D. Nev. Aug. 20, 2018) (stating the Fourth Amendment generally
6 applies to claims of excessive force made during an arrest and up to the time of arraignment,
7 while the Fourteenth Amendment's due process clause applies to excessive force claims by post-
8 arraignment pretrial detainees).

9 Here, Kemp cannot state a claim for cruel and unusual punishment under the Eighth
10 Amendment as a matter of law because he does not allege he was injured after he was found
11 guilty of a criminal offense. Rather, the amended complaint indicates he was injured before any
12 adjudication before a court. Kemp also cannot state a claim for a due process violation under the
13 Fourteenth Amendment as a matter of law because he does not allege he was a pretrial detainee at
14 the time he was injured. Rather, the amended complaint indicates he suffered the gunshot
15 wounds while at liberty, and he subsequently was injured by police who arrived at the scene to
16 assist him. Given that the Eighth and Fourteenth Amendment claims fail as a matter of law and
17 that Kemp has properly alleged an excessive force claim under the Fourth Amendment, the court
18 will recommend that his Eighth and Fourteenth Amendment claims be dismissed, without leave to
19 amend.

20 2. *Failure to supervise (claims one, two, and four)*

21 In his first claim, Kemp alleges Sergeant Garcia violated the Fourth, Eighth, and
22 Fourteenth Amendments by failing to supervise his subordinate officers or to prevent excessive
23 use of force. (*Id.* at 6.) In his second claim, Kemp alleges the LVMPD and Sheriff Joe
24 Lombardo violated the Eighth and Fourteenth Amendments by their "common practice" of
25 inadequately hiring and training its officers and by failing to take adequate measures to prevent
26 constitutional violations. (*Id.* at 7.) In his fourth claim, Kemp alleges that investigating officers
27 employed by LVMPD's internal affairs department failed to supervise subordinate officers and to
28 conduct an adequate investigation of the incident. (*Id.* at 11.)

1 A defendant is not liable under 42 U.S.C. § 1983 unless he personally participated in the
2 alleged deprivation of the plaintiff's rights. *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002).
3 "[T]here is no respondeat superior liability under section 1983." *Id.* However, a supervisor
4 personally participates, and may be liable in his own right, if the supervisor "directed the
5 violations, or knew of the violations and failed to act to prevent them." *Taylor v. List*, 880 F.2d
6 1040, 1045 (9th Cir. 1989). Advancing a policy that instructs subordinates to violate
7 constitutional rights also is a basis for § 1983 liability. *OSU Student All. v. Ray*, 699 F.3d 1053,
8 1076 (9th Cir. 2012).

9 Here, Kemp does not allege Sergeant Garcia, Joe Lombardo, the internal affairs
10 supervisors, or other LVMPD supervisors personally participated in the alleged violations of
11 Kemp's constitutional rights. While he generally states that they failed to adequately train and
12 supervise their subordinates, he does not allege a particular policy, statement, regulation,
13 decision, or custom that instructed subordinate officers to violate his constitutional rights. The
14 court therefore will recommend dismissal of Kemp's claims premised on a failure to supervise,
15 with leave to amend.

16 3. *Instructions for amendment*

17 If the United States district judge assigned to this case adopts this report and
18 recommendation and Kemp chooses to file a second amended complaint, Kemp is advised all
19 defendants must be identified in the caption of the pleading and that he must specify which claims
20 he is alleging against which defendants. Although the Federal Rules of Civil Procedure adopt a
21 flexible pleading policy, Kemp still must give defendants fair notice of each of the claims he is
22 alleging against each defendant. Specifically, he must allege facts showing how each named
23 defendant is involved and the approximate dates of their involvement.

24 Kemp further is advised that if he files a second amended complaint, the original
25 complaint (ECF No. 12) and amended complaint (ECF No. 13-1) no longer serve any function in
26 this case. As such, if he files a second amended complaint, each claim and the involvement of
27 each defendant must be alleged sufficiently. The court cannot refer to a prior pleading or to other
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1 documents to make his second amended complaint complete. The second amended complaint
2 must be complete in and of itself without reference to prior pleadings or to other documents.

3 **II. CONCLUSION AND RECOMMENDATIONS**

4 Based on the forgoing,

5 IT IS ORDERED that plaintiff Terrell Deshon Kemp's Motion for Leave to Amend
6 Complaint (ECF No. 13) is GRANTED.

7 IT IS FURTHER ORDERED that the clerk of court must detach and file Kemp's
8 amended complaint (ECF No. 13-1).

9 IT IS FURTHER ORDERED that the clerk of court must send Kemp the approved form
10 for filing a § 1983 complaint, instructions for the same, and a courtesy copy of his amended
11 complaint (ECF No. 13-1).

12 IT IS RECOMMENDED that:

- 13 • the portion of claim three alleging an excessive force under the Fourth
14 Amendment should proceed against Officer Cordova, Officer Cordero, and the
15 three John Doe officers;
- 16 • the remainder of claim three, which alleges excessive force claims under the
17 Eighth and Fourteenth Amendments against Officer Cordova, Officer Cordero, and
18 the three John Doe officers be dismissed, without leave to amend, as amendment
19 would be futile; and
- 20 • Claims one, two, and four be dismissed, with leave to amend.

21 IT IS FURTHER RECOMMENDED that the court set a deadline for Kemp to file a
22 second amended complaint;

23 IT IS FURTHER RECOMMENDED that the court advise Kemp that if he chooses not to
24 file a second amended complaint by the court-ordered deadline, this case will proceed only on
25 Kemp's Fourth Amendment excessive-force claim against Officer Cordova, Officer Cordero, and
26 the three John Doe officers.

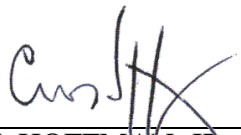
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III. NOTICE

This report and recommendation is submitted to the United States district judge assigned to this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation may file a written objection supported by points and authorities within fourteen days of being served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

DATED: February 12, 2019



C.W. HOFFMAN, JR.
UNITED STATES MAGISTRATE JUDGE